

REMARKS

Claims 10, 16, 18 and 22 are pending.

Double Patenting Rejection

Claims 10, 16, 18 and 22 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over:

A) claims 1-30 of US 6,489,269 ("the '269 patent"); and

B) claims 2, 5 and 6 of US 6,884,759 ("the '759 patent").

Applicants respectfully traverse the rejection.

Without conceding that the Examiner's rejections are proper, Applicants herewith submit a Terminal Disclaimer (TD) over US 6,489,269 and US 6,884,759, thereby rendering the obviousness-type double patenting rejections moot.

In legal principle, the filing of a TD simply serves the statutory function of removing the rejection of obviousness-type double patenting, and does not raise a presumption on the merits of the rejection. It is improper to view the simple expedient of "obviation" as an admission or acquiescence on the merits. *Ortho Pharmaceutical Corp. v. Smith*, 22 USPQ2d 1119, 1124 (Fed. Cir. 1992) citing *Quad Envtl. Technologies Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 874, 20 USPQ2d 1392, 1394-95 (Fed. Cir. 1991).

In view of the above amendment, applicant believes the pending application is in condition for allowance.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Garth M. Dahlen, Reg. No. 43,575 at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37.C.F.R. §§1.16 or 1.147; particularly, extension of time fees.

Dated: October 21, 2008

Respectfully submitted,

By  #43575

John W. Bailey *for*

Registration No.: 32,881

BIRCH, STEWART, KOLASCH & BIRCH, LLP

8110 Gatehouse Road

Suite 100 East

P.O. Box 747

Falls Church, Virginia 22040-0747

(703) 205-8000

Attorney for Applicant

Attachment: Terminal Disclaimer over US 6,489,269 and US 6,884,759